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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1935

Nos. ~~785-786~~

IN THE MATTER OF GRIGSBY-GRUNOW, INC.,
Bankrupt.

FRANK M. McKEY, Trustee in Bankruptcy,
Petitioner,

vs.

MAURICE PARADISE, as Trustee,
Respondent.

Answer to Petition for Writ of Certiorari.

JACK N. PRITZKER,
Counsel for Respondent.

STANFORD CLINTON,
Of Counsel.

CHICAGO LAW PRINTING CO., 107 NORTH WACKER DRIVE (COR. WASHINGTON ST.)

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

As pointed out by the petitioner, the facts underlying this controversy were the subject of a stipulation between the parties (R. 12-15). However, three observations should be made:

1. There were at all times sufficient sums in the bankrupt's bank accounts to pay the moneys due the Majestic Employees Welfare Association (R. 15).

2. The right to deduct the initial membership fee and the weekly dues from the salaries and wages of the employees of the bankrupt was a condition of employment imposed by the bankrupt (R. 12).

3. Until February 4, 1933 the bankrupt fully performed its obligations to its employees by promptly remitting the accumulated payroll deductions to the Majestic Employees Welfare Association. During the period from February 4, 1933 until November 24, 1933, while there was always a balance due from the bankrupt to the Association, the bankrupt partially performed its obligation (R. 12-13).

It is apparent, we feel, that this is not the kind of case called to the attention of the Court in the petitioner's citation of authorities, where a bank has failed to obey directions of a depositor to use certain money in the depositor's account for the purchase of securities or for other special purposes; nor like the case of *St. Louis S. F. R. Co.* v. *Spiller*, 274 U. S. 304-309, 71 L. E. 1060-67, where the dispute was between shippers of freight and a railroad on the question of excessive rates, in a controversy which is vastly different on the facts from the case at bar; nor like the case of *In re Newark Shoe Stores, Inc.*, 3 Fed. Sup. 293 (D. C. Md.) where *store managers* were required to deposit certain moneys as *security* for the faithful performance of their duties and where the employer while *authorized* to hold the moneys deposited, intermingled them with its other funds.

The duty of the bankrupt to segregate and remit the accumulated payroll deductions faithfully and *promptly* in order that the moneys could be used for the purposes of providing life, health and accident benefits for the bankrupt's employees and their families (R. 12) cannot fairly be compared with the duty devolving upon a bank dealing

with a depositor, or a railroad dealing with shippers, or a chain store concern dealing with moneys deposited as security with it by its store managers. If it be urged that there is a similitude in legal theory, a realistic analysis requires the acknowledgment that the difference in degree is so vast as to result in a difference in kind. It is difficult to conceive of a situation where the relationship between the parties, the nature of the obligation and the purpose of the undertaking would impose a higher fiduciary duty than in the instant case.

Then too, unlike any of the cases cited by petitioner, the instant case presents a trust relationship which rests not merely in acts promised for the future, but on the contrary here there was full performance of the bankrupt's fiduciary obligation for a long period of time and partial performance almost until the very day the Equity Receivers took possession of the bankrupt's business (R. 12-13). Thus we are not dealing here with obligations and duties merely promised and totally unperformed, but with obligations and duties performed in part and in part uncompleted.

The Circuit Court of Appeals, we submit, correctly analyzed the instant case in its opinion, in the following language:

> "Such transactions, we think, resulted in the creation of a trust, a constructive trust, a trust *ex maleficio*, which was fastened upon the bankrupt irrespective of its intention. When it deducted the twenty-five cents per week and the one dollar initiation fee, it was under obligation to turn the same over to the Majestic Employees Welfare Association. This it did for several years. But, with failure and bankruptcy confronting it, resort was had, as is so frequently the case, to subterfuge—to an attempt to despoil or dis-

possess those whose numbers were many and whose individual interests were small. Instead of turning over to the welfare association the money deducted from the employees' wages, the bankrupt converted it to its own use. It credited itself with the payment of the amount and yet retained the said sum in its own treasury. This was a conversion.

The turning point in the case is the transaction whereby bankrupt indebted to individual employees for wages took the same and satisfied its indebtedness to them and then failed to turn the money over to the beneficiary. Bankrupt's right to credit itself with the unpaid wages was dependent upon its payment of said sum to the welfare association.

What bankrupt did was to take the money the amount of which was the unpaid wages of its employees from one pocket and transfer the same money to another pocket, and to announce, in legal effect, that in this sum it was now indebted to the welfare association. It should have *paid* it to the association. It was guilty of conversion when it did not do so. The legal effect of such transaction was to make it a trustee *ex maleficio.*" (R. 43-44.)

While it may be true that it is necessary for the Court to invoke fictions and presumptions in order to impress a trust upon the assets of the bankrupt, certainly it must be conceded they are implements of justice which are indispensable to avoid consequences which would be shocking to equity and conscience. *Adams* v. *Champion*, 294 U. S. 231, 238. It is incredible that the malfeasance of the employer in failing to perform its fiduciary obligation to its employees and in converting the moneys from their wages and salaries to its own use, can be availed of by the

Trustee in Bankruptcy so that the moneys wrongfully held and retained by the employer will be disbursed to the general creditors of the bankrupt.

We respectfully submit that the petition for writ of certiorari should be denied by this Honorable Court.

JACK N. PRITZKER,
Counsel for Respondent.

STANFORD CLINTON,
Of Counsel.